Consolidating Arbitrations in the Federal Courts

I. INTRODUCTION

Consolidation of disputes arising out of the same law and facts poses numerous problems in private arbitration disputes. The power to consolidate is vested in courts pursuant to Rule 42 of the Federal Rules of Civil Procedure.[1] The courts, however, are confronted with special problems when consolidation involves private arbitration disputes because of the contractual nature of arbitration agreements and because the Federal Arbitration Act of 1925 (FAA) is silent on the issue of consolidation.[2] The FAA's silence has led to a great deal of controversy both between and within federal circuit courts over whether a court has the power to order consolidated arbitrations.[3]

One of the major issues that has been debated by both courts and commentators is whether a court has the power to look beyond arbitration agreements in ordering consolidation of arbitrations. Consolidation proponents point to the various policy and statutory considerations within the Federal Rules of Civil Procedure and the Federal Arbitration Act, which make mandatory consolidation outside the contract seem both logical and legally supportable.[4] Consolidation opponents cite recent United States Supreme Court interpretations of the FAA that favor strict enforcement of arbitration agreements rather than policy considerations, such as judicial economy.[5] The recent trend in federal circuit courts has been to oppose consolidation, a position likely to continue absent Supreme Court direction to the contrary.

This Comment will examine United States Supreme Court

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1. FED. R. CIV. P. 42(a) states:

> When actions involving a common question of law or fact are pending before the court, . . . [the court] may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated under a consolidated complaint; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

2. United States Arbitration Act, 9 U.S.C. § 2 (1988 & 1991 Supp.).

3. *See generally Consolidation by Federal Court of Arbitration Proceedings Brought Under Federal Arbitration Act*, 104 A.L.R. Fed. 251 (1991); Karen M. Chastain, Note, *Federal Circuit Conflict Regarding Consolidation of Arbitration*, 40 U. FLA. L. REV. 411 (1988).

4. *See infra* notes 35-48 and accompanying text. *See generally* S. Douglas Kerner, Note, *Federal Courts Lack the Power to Consolidate Arbitration Proceedings*, Baesler v. Continental Grain Co., 900 F.2d 1193 (8th Cir. 1990), 69 WASH. U. L.Q. 349 (1991).

5. *See infra* notes 28-34 and accompanying text.

decisions discussing relationships between courts and private agreements to arbitrate that are applicable to consolidation. This Comment will also scrutinize the reasoning behind the federal circuit decisions that oppose and support consolidation. The case law analysis will be followed by a review of the responses some states have made when attempting to resolve consolidation with legislative action. Finally, this Comment will suggest some possible answers to the consolidation problem that has been plaguing courts for almost two decades.

II. THE SUPREME COURT AND CONSOLIDATION UNDER THE FEDERAL ARBITRATION ACT: ENFORCING CONTRACTUAL AGREEMENTS TO ARBITRATE

Arbitration agreements have become increasingly common in modern business contracts. While initially hostile to arbitration, the judiciary has recently embraced arbitration as a solution to an overburdened judicial system. The United States Supreme Court has also become more receptive to contractual arbitration agreements.[6] This section will explore some of the relevant sections of the Federal Arbitration Act, and the Supreme Court's interpretation of the role courts should play in enforcing arbitration agreements.

A. The Federal Arbitration Act Generally

Congress passed the Federal Arbitration Act (FAA) in 1925. The FAA validated arbitration contracts and overturned many common law doctrines hostile to arbitration.[7] In passing the FAA, Congress sought to provide alternatives to litigation by making agreements to arbitrate legally enforceable.[8] Congress also expressed an interest in avoiding the delay

6. For analysis of recent developments on the United States Supreme Court's attitude towards arbitration see Arthur S. Feldman, Note, Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University: *Confusing Federalism with Federal Policy Under the FAA*, 69 TEX. L. REV. 691 (1991).

7. *See generally* Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305 (1985).

8. H.R. REP. NO. 96, 68th Cong., 1st Sess. 1 (1924); S. REP. NO. 536, 68th Cong., 1st Sess. 1 (1924); The House Report stated "[t]his bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement." H.R. REP. NO. 96, 68th Cong., 1st Sess, 1, 2 (1924).

and expense of litigation through the use of arbitration.[9] These purposes can conflict when a court is attempting to interpret an ambiguous arbitration agreement. Strictly enforcing arbitration agreements sometimes produces inefficient results that parties may be seeking to avoid when they contract for resolution of disputes through arbitration. Moreover, while the FAA requires the enforcement of arbitration agreements, the FAA does not specify which considerations a court should use when determining the proper method of enforcement. Courts considering consolidated arbitrations (consolidation is not mentioned in the FAA) have favored different interpretations of whether consolidation outside the contract is within the power of courts under the FAA.

Section 4 of the FAA provides that once a court is satisfied that a contract requires arbitration, the court must order the parties "to proceed to arbitration in accordance with the terms of the agreement."[10] Those opposing consolidation believe the dominant concern of Congress in passing the FAA was to enforce private arbitration agreements as written.[11] Those favoring consolidation assert that doubts about the reach of the FAA should be resolved in favor of consolidated arbitrations.[12] Active debate on each view has occupied both courts and commentators for many years. However, some recent United States Supreme Court decisions have helped clarify the Court's view on the FAA.

B. The United States Supreme Court's Response to Arbitration Agreements

In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,[13] the Supreme Court explained that the FAA "is a congressional

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9. "[I]t is practically appropriate that [legislation be approved] when there is no such agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable." H.R. REP. No. 96, 68th Cong., 1st Sess. 1, 2 (1924).

10. 9 U.S.C. § 4 (1988 & Supp. 1991) provides:

> [A] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

11. *See infra* notes 28-34 and accompanying text.

12. *See infra* notes 35-48 and accompanying text.

13. 460 U.S. 1 (1983).

declaration of a liberal federal policy favoring arbitration agreements."[14] The Court added that "the Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of consolidation."[15] In recent years the Court has adopted a broader view of the enforceability of arbitration agreements. In *Rodriguez de Quijas v. Shearson/American Express, Inc.*,[16] the Court overruled a 1953 decision, *Wilko v. Swan*, that had limited the arbitrability of certain provisions of the Securities Act of 1933.[17] The *Rodriguez* Court held that an agreement to arbitrate statutory securities claims was valid under the broad language of the FAA. The Court characterized the *Wilko* decision as evidence of the old judicial hostility towards arbitration.[18]

As courts have become increasingly receptive to arbitration agreements in almost all circumstances, the Supreme Court has also been faced with the problem of determining how these agreements should be enforced. The Court has stated that "the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so."[19] Enforcing arbitration agreements as "bargained-for" contracts has gained momentum in the Supreme Court.[20] In *Moses H. Cone*, the Court ordered the enforcement of an arbitration agreement even though the arbitration would result in inefficient bifurcated proceedings.[21] The *Moses H. Cone* decision opened the door for the Supreme Court's decision in *Dean Witter Reynolds, Inc. v. Byrd*,[22] which firmly established agreements to arbitrate as almost exclusively contractual in nature.

C. The Byrd Decision: Consolidation and the Contract

Almost all post-1985 federal circuit court decisions on

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14. *Id.* at 24.

15. *Id.* at 24-25.

16. 490 U.S. 477 (1989).

17. Wilko v. Swan, 346 U.S. 427 (1953).

18. *Rodriguez*, 490 U.S. at 480-82.

19. Prima Paint Corp. v. Flood Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967).

20. *See* Volt Info. Sci., Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468 (1989) (parties may contract to use different arbitration rules other than those set forth in the FAA); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (parties may contract to arbitrate statutory claims). *See generally* Feldman, *supra* note 6.

21. *Moses H. Cone*, 460 U.S. at 20.

22. 470 U.S. 213 (1985).

consolidated arbitration mention the Supreme Court's decision in *Dean Witter Reynolds, Inc. v. Byrd.* However, the *Byrd* decision did not provide a direct holding on the issue of consolidation. *Byrd* involved a written agreement to arbitrate claims that arose out of a broker-dealer relationship. Byrd had filed an action against Dean Witter Reynolds in federal district court alleging various securities and state law violations. Dean Witter filed a motion to compel arbitration of the pendant state claims pursuant to the arbitration agreement. Both the district court and the court of appeals refused to compel the arbitration of state law claims. The Supreme Court reversed, holding that the FAA requires district courts to compel arbitration of pendant arbitrable claims, even when the result could be the inefficient maintenance of separate proceedings in different fora.[23] The Court added that there was no room for discretion in the district court and that the FAA mandated all courts to enforce arbitration agreements as signed.[24] This enforcement requirement, the Court explained, was in furtherance of the FAA's legislative purpose of ensuring judicial enforcement of privately made arbitration agreements whether or not it promoted the expeditious resolution of claims.[25]

Circuit courts have applied the reasoning of *Byrd* to the consolidation question in arbitration cases. Opponents of consolidation use *Byrd* to reject court ordered consolidation on the grounds that courts would have to go outside the contract to apply consolidation. This "modified contract" may usurp the Court's reasoning in *Byrd* that the FAA mandates the enforcement of arbitration agreements as written.[26] However, courts that have chosen to consolidate arbitrations assert that *Byrd* gives no holding on consolidation, and while judicial economy may not be the main goal of the FAA, it remains a desired effect and should be pursued when consolidation would not conflict with the terms of the original agreement.[27] Whether the former or latter application of *Byrd* in consolidated arbitration cases is correct has not been determined by the Supreme Court. Analyzing the decisions of federal circuit courts both pre- and post-*Byrd* helps clarify the arguments opposed to and in favor of court ordered consolidation.

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23. *Id.* at 217. For a discussion of some of the broad ramifications of the *Byrd* decision see Michael Durrer, Note, *Enforcing Arbitration of Federal Securities Law Claims: The Effect of* Dean Witter Reynolds, Inc. v. Byrd, 28 WM. & MARY L. REV. 335 (1987).

24. *Byrd*, 470 U.S. at 218.

25. *Id.* at 220-21.

26. *See supra* notes 23-25 and accompanying text.

27. *See infra* notes 35-48 and accompanying text.

III. FEDERAL CIRCUIT COURTS

No consensus of opinion exists as to whether it is permissible for courts to order consolidation of arbitrations under the FAA. The trend since the Supreme Court's decision in *Byrd* has been against court ordered consolidation. However, even the *Byrd* decision did not definitively resolve the debate. This section of the paper will examine the reasoning behind the federal circuit courts' decisions that have rejected or accepted consolidation.

A. Strict Interpretation of Contracts: Courts Lack the Discretion to Order Consolidation

In *American Centennial Ins. Co. v. National Casualty Company*,[28] the Sixth Circuit Court of Appeals joined a growing majority of federal circuits that have refused to order mandatory consolidation of arbitration proceedings. *American Centennial* involved a dispute over eight separate reinsurance treaties which contained clauses providing that disputes arising under the treaties would be submitted to arbitration. The plaintiffs demanded arbitration on all eight treaties and sought to consolidate the arbitration proceedings into a single action. The treaties did not contain express or implied terms either allowing or requiring consolidation.[29]

The Sixth Circuit, citing the Supreme Court's decision in *Dean Witter Reynolds v. Byrd*, upheld the district court's decision not to consolidate the arbitrations. The Sixth Circuit stated that courts are not permitted to interfere with private arbitration agreements even when the result may be the inefficient maintenance of separate arbitration proceedings. Because the contracts in this case were silent on the issue of consolidation, the court refused to order consolidation.[30]

The Sixth Circuit's decision follows the Eighth Circuit's 1990 decision in *Baesler v. Continental Grain Co.*,[31] which also rejected consolidation. In *Baesler*, like *American Centennial*, the court rejected consolidation on the grounds that the FAA requires courts to enforce

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28. 951 F.2d 107 (6th Cir. 1991).

29. *Id.*

30. *Id.* This Sixth Circuit case upheld the decision of the district court (American Centennial Ins. Co. v. National Casualty Co., 761 F. Supp. 472 (N.D. Ohio 1991)) and resolved a split in the circuit over whether mandatory consolidation was appropriate. *See* Hoover Group, Inc. v. Probala & Assoc., 710 F. Supp. 677 (N.D. Ohio 1989) (court ordered consolidation is permissible under limited situations).

31. 900 F.2d 1193 (8th Cir. 1990).

arbitration agreements as written, and a court cannot go outside the agreement to mandate consolidation. The Fifth, Ninth, and Eleventh Circuits have also held that district courts lack the power to order consolidation where the arbitration agreements do not specifically provide for consolidation. These courts have adopted the view that a court may only enforce an arbitration agreement "in accordance with its terms."[32] Moreover, the Ninth Circuit, in *Weyerhaeuser Co. v. Western Seas Shipping Co.*,[33] compared an arbitration clause with a forum selection clause that would determine both the place where disputes would be settled and the procedures used to resolve the differences. If an agreement did not provide for consolidation it was not a procedure to which the parties consented. Deviations from these arbitration agreements could be treated as a breach of contract.[34]

The federal circuit courts that have refused to compel consolidation have declined to do so almost exclusively based upon a theory that the courts' only role in the arbitration process is to strictly enforce arbitration agreements. These courts view attempts to consolidate beyond the scope of the contract as a modification of the original arbitration agreement. If courts are to follow the Supreme Court's mandate in *Byrd* and enforce arbitration agreements as written, they clearly could not read provisions into a contract which would modify the original agreement. However, some courts have rejected the theory that consolidation represents an alteration of an arbitration agreement. These "consolidation advocates" continue to look beyond the contract for policy and efficiency considerations that support consolidation.

B. Looking Outside the Contract: The Power to Order Consolidation

Courts ordering consolidation emphasize that the Federal Rules of Civil Procedure (FRCP), specifically Rules 42(a) and 81(a)(3), provide legal support for consolidation.[35] Rule 81(a)(3) allows courts to apply

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32. Protective Life Ins. v. Lincoln Nat'l Life Ins., 873 F.2d 281 (11th Cir. 1989) (agreements between three parties did not provide for consolidation, and federal courts were without power to consolidate absent such provisions); Del E. Webb Constr. v. Richardson Hosp. Auth., 823 F.2d 145 (5th Cir. 1987) (the sole question for a district court to determine is whether an agreement provides for consolidated arbitration); Weyerhaeuser Co. v. Western Seas Shipping Co., 743 F.2d 635 (9th Cir.), *cert. denied*, 469 U.S. 1061 (1984).

33. 743 F.2d 635 (9th Cir. 1984).

34. *Id.*

35. *See* Compania Espanola de Petroleos, S.A. v. Nereus Shipping, 527 F.2d 966, 975 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (J.A. 1976); Robinson v. Warner, 370 F. Supp. 828, 831 (D.R.I. 1974). *See generally* Chastain, *supra* note 3, at 420.

the Federal Rules of Civil Procedure when the FAA is silent on matters of procedure.[36] Because the FAA is silent on consolidation, courts should apply FRCP 42, allowing consolidation of actions involving common questions of law and fact.[37] Whether these provisions of the Federal Rules provide an adequate ground for consolidation is clearly debatable. The circuit court decisions allowing consolidation help shed light on this debate.

In the leading case allowing for consolidation, *Compania Espanola de Petroleos, S.A. v. Nereus Shipping*,[38] the Second Circuit held that the district court had the power to consolidate two arbitrations "because the extensive and complicated issues were so intertwined and overlapping that it could have caused great and irreparable injustice" if the arbitrations proceeded separately.[39] The *Nereus* court also stated that the "liberal purposes of the Federal Arbitration Act clearly require that this Act be interpreted so as to permit and even to encourage the consolidation of arbitration proceedings in proper cases."[40] However, following the Supreme Court's decision in *Byrd*, there was some question about whether *Nereus* was still good law in the Second Circuit.

In *Ore and Chemical Corp. v. Stinnes Interoil, Inc.*,[41] the United States District Court for the Southern District of New York refused to consolidate arbitrations where the original agreements had not provided for consolidation. The court rejected *Nereus*, reasoning that the Second Circuit would have to overrule *Nereus* in light of the Supreme Court's decision in *Byrd*. The *Ore* court read *Byrd* as mandating that courts enforce arbitration agreements strictly, which prevented the court from going outside the contract to order consolidation.[42] The district court also concluded that the Federal Rules of Civil Procedure, used as justification for consolidation in *Nereus*, could not be used to alter the original arbitration agreement.[43] Finally, the *Ore* court asserted that arbitrators deciding the merits of the matter could more efficiently rule on procedural matters like consolidation. Subsequent cases in the Second Circuit have not followed *Ore*.

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36. FED. R. CIV. P. 81(a)(3) provides that "[i]n proceedings under Title 9, U.S.C., relating to arbitration, . . . these rules apply only to the extent that matters of procedure are not provided for in those statues."

37. FED. R. CIV. P. 42(a). *See supra* note 1.

38. 527 F.2d 966 (2d Cir. 1975).

39. *Id.* at 968.

40. *Id.* at 975.

41. 606 F. Supp. 1510 (S.D.N.Y. 1985).

42. *Id.* at 1513.

43. *Id.* at 1513-15.

In *Sociedad Anonima de Navegacion Petrolera v. CIA. De Petroleos de Chile S.A.*,[44] a district court in the Second Circuit decided that the *Byrd* decision did not bar mandatory consolidation. The court found that the reliance on *Byrd* by the *Ore* court was misguided because *Byrd* did not specifically address the consolidation issue. The *Sociedad* court, following the rationale in *Nereus*, reasoned that courts could order consolidation to promote judicial economy where there was no direct conflict with the arbitration agreement. Consolidating arbitrations, if not specifically prohibited, was within the discretion of a district court.[45]

The District Court for the Southern District of New York once again addressed the issue of the applicability of *Nereus* in light of *Ore* in *Elmarina, Inc. v. Comexas, N.V.*[46] In *Elmarina*, the district court was presented with a situation where consolidating arbitrations would avoid both the possibility of inconsistent results and save money for all parties involved. The *Elmarina* court stated that "[a]lthough the decisions of the Ninth Circuit in *Weyerhauser* and Judge Edelstein in *Ore* are compelling, the Court is inclined to . . . abide by the Second Circuit's opinion in *Nereus*."[47] Furthermore, the court asserted that while the Supreme Court's decision in *Byrd* was instructive, it did not reverse *Nereus*. The *Elmarina* court listed several factors that could be considered by courts in deciding whether to consolidate arbitrations:

> 1) The possibility of conflicting findings;
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> 2) The possibility that a substantial right might be prejudiced if separate arbitration proceedings are conducted;
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> 3) The possibility of conflicting awards or inconsistent results where common questions of law or fact exist; and
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> 4) The possibility that undue prejudice, delay or cost may be avoided.

These factors are to be considered by the district court in exercising its discretionary consolidation powers.[48]

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44. 634 F. Supp. 805 (S.D.N.Y. 1986).

45. *Id.* at 809.

46. 679 F. Supp. 388 (S.D.N.Y. 1988).

47. *Id.* at 391.

48. *Id.* The District Court for the Northern District of Ohio applied these factors in Hoover Group, Inc. v. Probala & Associates, 710 F. Supp. 677 (N.D. Ohio 1989), and decided that consolidation was appropriate.

Whether or not a district court has the discretionary power to consolidate is a central issue of debate since the Supreme Court's decision in *Byrd*. Although other circuits have unequivocally applied *Byrd* to consolidation cases, Second Circuit courts have refused to do so in most cases. The Second Circuit has yet to resolve the post-*Byrd* consolidation issue but the majority of cases in the circuit continue to follow *Nereus*, endorsing consolidation.[49]

The debate over consolidation is likely to continue absent a Supreme Court decision or a specific legislative directive. Some states have attempted to solve the problem by passing state arbitration acts allowing court ordered consolidation. However, these legislative efforts in states have met with some resistance from those who feel the state legislatures are usurping the Federal Arbitration Act.[50]

IV. THE STATE'S RESPONSE: LEGISLATIVE APPROACHES TO CONSOLIDATION

State legislatures have been slow to offer any solutions to the consolidation problem. States that have attempted to provide for consolidated arbitrations have been careful not to preempt the FAA. Neither the United States Supreme Court nor any federal circuit court has yet to strike down a state consolidation statute for being in conflict with the FAA. This may suggest that those states desiring to allow consolidated arbitrations should pass the appropriate legislation in their state legislatures or be left with the often unclear decision of the federal courts. This section will explore state statutes that have been passed as a response to consolidated arbitration.

The First Circuit Court of Appeals concluded in *New England Energy, Inc. v. Keystone Shipping Co.*,[51] that consolidated arbitrations could be ordered under the Massachusetts' arbitration consolidation statute. The appellants sought to consolidate two related arbitrations pursuant to the Massachusetts Uniform Arbitration Act.[52] Appellees opposed the

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49. For other cases in the Second Circuit allowing consolidation since *Byrd*, see Edelman v. Marek, 1992 U.S. Dist. LEXIS 16313 (S.D.N.Y. 1992); Clipper Gas v. PPG Industries, Inc., 804 F. Supp. 570 (S.D.N.Y. 1992); Cable Belt Conveyors, Inc. v. Alumina Partners of Jamaica, 669 F. Supp. 577 (S.D.N.Y.), *aff'd*, 857 F.2d 1461, *cert. denied*, 484 U.S. 855 (1987); Shoyo Shipping Co., Ltd. v. Shipmair, 1986 A.M.C. 2374 (S.D.N.Y. 1986).

50. *See infra* note 61.

51. 855 F.2d 1 (1st Cir. 1988), *cert. denied*, 489 U.S. 1977 (1989).

52. MASS. ANN. LAWS ch. 251, § 2A (Law. Co-op. 1992).

consolidation on the grounds that, absent express consent, consolidation was barred by section 4 of the FAA, which required courts to enforce arbitration agreements as written, and the FAA preempted any contradictory state statute.[53] The *Keystone* court found that the FAA did not preempt all state law on arbitration, and because the FAA is silent on the issue of consolidation, the Massachusetts statute did not directly conflict with the FAA's provisions.[54] The court reasoned that when a contract is silent on the issue of consolidation a court ordering consolidation would not be contradicting the terms of the contract, especially when state law allows for consolidated arbitrations.[55] Finally, the *Keystone* court determined that "the Massachusetts arbitration consolidation provision, as appellants seek to enforce it, does not in any way limit the 'broad principle of enforceability' of private agreements to arbitrate."[56] The statute seeks only to make the arbitration process more efficient.

The dissent in *Keystone* argued that consolidation was inappropriate because the FAA and Supreme Court precedent mandated that agreements to arbitrate be strictly enforced. The dissent asserted that even if the consolidated arbitration would be more economical or efficient, it was not what the parties agreed to undertake. A court ordering consolidation would be altering the parties' original agreement.[57]

State statutes providing for consolidated arbitrations are not common.[58] *Keystone* demonstrates that there are some concerns about statutes which may conflict with the FAA. California has adopted a consolidation statute placing conditions on consolidation of arbitrations. Generally, under the California statute, if there is a common issue of law or fact arising out of the same transaction that would create the possibility of conflicting results if the disputes were not consolidated, a judge can order consolidation.[59] Like its Massachusetts counterpart, there is some

53. *Keystone*, 855 F.2d at 3.

54. *Id.* at 6.

55. *Id.* at 6-7.

56. *Id.* at 6.

57. *Id.* at 8 (Selya, J., dissenting).

58. There are four states (California, Florida, Georgia, and Massachusetts) that allow for consolidated arbitration as a matter of state law. *See* CAL. CIV. PROC. CODE § 1281.3 (West 1982); FLA. STAT. § 684.12 (West 1990); GA. CODE ANN. § 9-9-6(e) (Michie 1991); MASS. ANN. LAWS ch. 251 § 2A (Law. Co-op. 1992). *See generally State Court's Power to Consolidate Arbitration Proceedings*, 64 A.L.R. 3d 528 (1975).

59. CAL. CIV. PROC. CODE § 1281.3 (West 1991).

dispute about this statute conflicting with the FAA.[60] Clearly though, the reaction of states to consolidated arbitrations is permissive.[61]

The states' attempts to solve the consolidation conflict have met with some resistance. States are not allowed to regulate arbitration in ways inconsistent with the FAA.[62] However, where the FAA is silent, the state's power to supplement the "Act on matters collateral to the agreement to arbitrate" may be broader.[63] In any event, attempts by state legislatures to supplement the FAA may not completely succeed where the states attempt to expand arbitration in ways inconsistent with the goals of the FAA.[64]

V. ANALYSIS: THE FUTURE OF COURT ORDERED CONSOLIDATION

Compelling consolidated arbitrations where a contract has not provided for consolidation is clearly problematic. Courts in the Second Circuit and some commentators argue that support for consolidation exists in Rule 81(a)(3) of the Federal Rules of Civil Procedure, which allows courts to apply the FRCP when the FAA is silent on procedural issues of arbitration.[65] Other courts and commentators reject FRCP 81(a)(3) in favor of enforcing arbitration agreements as written.[66] Nevertheless, while the applicability of FRCP 81(a)(3) to consolidation questions remains unclear,[67] the future of court-ordered consolidation may have already

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60. *See* Elizabeth P. Allor, Note, Keating v. Superior Court: *Opressive [sic] Arbitration Clauses in Adhesion Contracts*, 71 CALIF. L. REV. 1239, 1244-46 (1983).

61. Decisions approving of consolidation of arbitration under state law include: Garden Grove Community Church v. Pittsburgh-Des Moines Steel Co., 191 Cal. Rptr. 15, 19-20 (Cal. Ct. App. 1983); Exber, Inc. v. Sletten Constr. Co., 558 P.2d 517, 523-24 (Nev. 1976); County of Sullivan v. Edward L. Nezelak, Inc., 366 N.E.2d 72, 74-75 (N.Y. 1977).

62. Southland Corp. v. Keating, 465 U.S. 1, 13 (1984).

63. New England Energy, Inc. v. Keystone Shipping Co., 855 F.2d 1, 5 (1st. Cir. 1988).

64. *See* discussion of Judge Selya in *Keystone*. "[S]uperimposing Massachusetts' pro-consolidation policy on the expressed wishes of the contracting parties unduly exalts state law and, in the process, subverts the concept of 'creat[ing] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.'" *Id.* at 10 (Selya, J., dissenting).

65. *See supra* notes 44-49 and accompanying text.

66. *See supra* notes 28-34 and accompanying text.

67. *See generally* Chastain, *supra* note 3, where the author suggests that the Supreme Court's opinion in John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964), seems to indicate that the decision to consolidate, while procedural in nature, should be left to the arbitrator and not the courts if the parties have already obligated themselves to arbitration.

been decided by the Supreme Court's decision in *Dean Witter Reynolds, Inc. v. Byrd.*

Those who favor court-ordered consolidation will eventually be forced to justify consolidation in the context of the broad and sweeping language of *Byrd.* The *Byrd* court, in mandating the strict enforcement of arbitration agreements, took away a district court's discretion in enforcing arbitration agreements.[68] This absence of discretion indicates that district courts who have relied on their "discretion" in determining whether to order consolidation, may have to rethink their positions. Without discretionary power to interpret contracts, a district court's power to consolidate is suspect.[69] The solution to the consolidation problem may ultimately lie with Congress and state legislatures. Recent United States Supreme Court decisions suggest the Court is unwilling to impose obligations on parties to an arbitration agreement when those parties have not specifically contracted for the obligation.[70] Legislative action granting courts the power to consolidate arbitrations would eliminate the requirement that a contract must specifically provide for consolidation before it could be ordered. While some have claimed that the FAA preempts state regulation of consolidated arbitration, those arguments have not been persuasive in the federal courts.[71] Most courts and commentators agree that consolidating arbitrations is desirable in many instances. However, courts cannot exercise the power to consolidate if they have not been granted that power by the legislature.

VI. CONCLUSION

An agreement to arbitrate is a contractual obligation. When consolidation is not mentioned as part of an agreement to arbitrate, parties have not bound themselves contractually to consolidation. Courts charged with enforcing arbitration agreements are limited by the FAA and, in some instances, by state statutes which supplement the FAA. Although

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68. *See supra* notes 22-25 and accompanying text.

69. Proponents of court-ordered consolidation have also argued that consolidation has become so common in commercial disputes that parties must impliedly consent to consolidation when they enter agreements to arbitrate. This argument ignores the contractual nature of arbitration agreements and is best answered by Judge Edelstein in Ore and Chemical Corp. v. Stinnes Interoil Inc., 606 F. Supp. 1510 (S.D.N.Y. 1985), when he stated "if consolidated arbitration is so common and expected, . . . then the industry's participants should make consolidation provisions standard in their arbitration clauses." *Id.* at 1513 n.4.

70. *See supra* notes 13-27 and accompanying text.

71. *See supra* notes 50-61 and accompanying text.

equitable considerations may suggest that consolidation is appropriate under some circumstances, courts do not possess the discretionary power to alter arbitration agreements that contain no consolidation provisions. Unless legislative action specifically empowers courts with the ability to consolidate arbitrations, courts must continue to reject consolidation as an option when consolidation provisions are not contained in an arbitration agreement.

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